

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

NC-DSH, LLP d/b/a DESERT SPRINGS
HOSPITAL MEDICAL CENTER,

Respondent

and

Case No.: 28-CA-127971

THERESA VAN LEER, an Individual

**RESPONDENT NC-DSH, LLP d/b/a DESERT SPRINGS
HOSPITAL MEDICAL CENTER'S BRIEF IN SUPPORT OF EXCEPTIONS**

Respondent NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center, by and through its undersigned attorneys, pursuant to Section 102.46(c) of the Board's Rules and Regulations submits its Brief¹ in support of its Exceptions to the Administrative Law Judge's Decision² which are filed simultaneously with this Brief.

I. STATEMENT OF CASE AND OVERVIEW

This case was tried in Las Vegas, Nevada, on January 6 and 7, 2015, pursuant to a Complaint that issued on July 31, 2014. On March 13, 2015, Administrative Law Judge Ira Sandron issued a Decision and Notice to Employees. Respondent submits that Judge Sandron's findings, credibility determinations, and legal conclusions relative to a number of the allegations in the Complaint require that the Board grant Respondent's Exceptions.

¹ Transcript references are designated "Tr." followed by the appropriate page and line number(s).

² References to the Administrative Law Judge's Decision are designated "JD" followed by the appropriate page and line number(s).

II. THE APPLICABLE LEGAL STANDARDS

The Board will not overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the judge's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*. 188 F.2d 362 (3rd Cir. 1951). However, the Board has cautioned that an Administrative Law Judge cannot simply ignore relevant testimony bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word "demeanor." *Permaneer Corp.*, 214 NLRB 367, 369 (1974). The Board has also noted that less weight is accorded to an Administrative Law Judge's credibility findings where the judge "omits reference to relevant testimony on critical matters and mistakenly mischaracterizes the state of the record." *Bralco Metals, Inc.*, 227 NLRB 973, fn. 4 (1977).

Courts have also expressed concern about an Administrative Law Judge's discrediting of uncontradicted testimony. In *Medline Industries v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979), the Seventh Circuit reversed an Administrative Law Judge's credibility resolutions and quoted approvingly from the Eighth Circuit case of *Banner Biscuit Co. v. NLRB*, 356 F.2d 726, 768 (8th Cir. 1966):

An examiner may give credence and weight to the testimony of the general counsel's witnesses in preference to that of the employer. . . . But, a complete disregard for sworn testimony coupled with a tongue-in-cheek characterization of those utterances . . . depreciates the examiner's findings and obliges our close examination.

Significantly, the Board in *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006), reversed credibility findings where the ALJ failed to acknowledge "uncontradicted testimony." *Starcraft* at 1231 (*citation omitted*).

III. ARGUMENT

A. Clear and unmistakable factual errors in the ALJ's Decision not based on credibility determinations (Exceptions 6, 7, 9, 10, and 11)³

There are a number of factual errors contained in the ALJ's Decision. Many of these relate to undisputed evidence. These errors resulted in erroneous findings that Respondent was responsible for unfair labor practices it did not commit.

The ALJ found that Charging Party Van Leer did not know that co-employee Fulton was at work when she telephoned her on March 19, 2014. (JD at 11, ll. 4-7, Exception 6.) In fact, Van Leer testified that she did know Fulton was at work. She stated that Fulton was the first person on duty that she had spoken with. (Tr. at 250, l. 25 - 251, ll. 1-2.) Therefore, contrary to the ALJ's Opinion, Van Leer was speaking with an employee she knew was at work and on duty.

The ALJ's Opinion incorrectly finds that Van Leer saw Fulton the morning after the telephone call. (JD at 11, l. 22; Exception 7.) Van Leer gave extensive testimony concerning the fact that she did not see Fulton the day after the telephone call. Van Leer testified that after reading a memo and speaking with employees on her unit, she called Fulton at home around 10:00 a.m. on March 20. (Tr. at 225, ll. 1-23.) The next day, March 21, 2014, and several days thereafter, Van Leer saw Fulton as she was arriving for work. (Tr. at 260, ll. 12-21.) Van Leer made a point of talking to Fulton several times between Thursday, March 20, and Fulton's meeting with Human Resources Administrator Fabiyi on March 25, 2014. (Tr. at 264, ll. 7-11.)

The ALJ's Opinion incorrectly found that Schmid prepared Joint Exhibit 5 on March 20, 2014. (JD at 11, ll. 26-27; Exception 9.) The ALJ found Schmid credible. The undisputed evidence is that Schmid prepared Joint Exhibit 5, a recitation of the meeting with Fulton in Supervisor Murphy's office on March 19, 2014. (Tr. at 158, ll. 10-14.)

³ Exception 26 applies to all sections of Respondent's Brief.

The ALJ incorrectly found that Fabiyi and Murphy met with Fulton in Fabiyi's office. (JD at 11, ll. 26-32; Exception 10.) Fabiyi testified at length and his testimony was undisputed that the meeting took place in Supervisor Murphy's office on the 5th floor of the facility. (Tr. at 66, l. 5.) Fabiyi credibly explained that one of the reasons for this is that Fulton was uncomfortable going to the Human Resources office to talk about the telephone call. (Tr. at 67, ll. 16-23.) Fabiyi described Fulton as being very upset and felt Van Leer used vulgar and abusive language in the telephone call and Fulton felt threatened. (Tr. at 68, ll. 6-10.)

The ALJ found that an adverse interest should be drawn from the fact that Fabiyi did not obtain a statement from Fulton. (JD at 11, ll. 35-40 - 12, ll. 1-2; Exception 11.) As detailed in Fabiyi's testimony, Fulton was very upset over the telephone call with Van Leer. She was too uncomfortable to have a meeting in the Human Resources Department. She described the telephone call as not being pleasant and she said she felt threatened. (Tr. at 67, ll. 16-25; at 68, ll. 1-17.) Fabiyi made detailed notes of the meeting and reviewed Schmid's e-mail with Fulton. The ALJ's finding is not supported by any evidence but by the ALJ's own stated belief that the statement should have been obtained. Fabiyi had discretion as to how to conduct the investigation, and he conducted a thorough investigation which did not necessitate obtaining a written statement from a witness who was clearly unnerved by the situation.

B. The ALJ's Decision contains a critical error that the Level 3 Disciplinary Action issued to Van Leer was based solely on her March 19, 2014, conduct (JD at 11, ll. 23-24; at 19, ll. 32-39; Exceptions 8 and 18)

The ALJ's Decision made a finding that the Level 3 Disciplinary Action issued to Van Leer was based solely on her March 19, 2014, conduct on the telephone with Fulton. This is a serious error.

The evidence demonstrated clearly that there was an ongoing investigation into the events of March 19, 2014. The undisputed evidence is that Van Leer contacted Fulton by telephone on

March 19, 2014; that a meeting was held in Fulton's Supervisor's office on March 19, 2014; that Schmid prepared Joint Exhibit 5 on March 19, 2014; that Van Leer called Fulton on the telephone around 10:00 a.m. on March 20, 2014, to ask her about the alleged harassment complaint. (Tr. at 225, ll. 1-25.) It is further undisputed that Van Leer testified that she made in-person contact with Fulton a number of times, including March 21, 2014, and several other times prior to March 25, 2014. (Tr. at 264, ll. 7-12.)

The importance of this cannot be overstated. When Fabiyi and Murphy met with Fulton on March 25, 2014, she was still visibly shaken about the events. In addition, Van Leer had communicated repeatedly with her and made clear that Van Leer did not want to be disciplined for her harassing conduct. Respondent had every right in its evaluation of the evidence to consider whether or not Fulton's backing off of her original version of the telephone call could be caused by Van Leer's contact. Obviously, the follow-up contact was discussed as Fabiyi's contemporaneous notes in General Counsel's Exhibit 4 indicate that this follow-up contact had occurred. Therefore, the ALJ Opinion's attempt to isolate the disciplinary action to be based solely on the March 19, 2014, conduct and not based on the events which transpired thereafter is an error.

C. Factual Review (Exceptions 3, 4, 12, 13, 14, 16, and 17)

The inexplicable factual errors discussed above necessitate a review of the testimony and exhibits, particularly the testimony of Fabiyi, Cassard, and Van Leer.

1. Yomi Fabiyi

Fabiyi was involved in the disciplinary action against Van Leer as a result of her telephone call to CNA Terry Fulton. (Tr. at 60, ll. 8-14.) Fabiyi became aware of an allegation of wrongdoing against Van Leer from Jeanne Schmid, Vice President Labor Relations for

Universal Health Services, on March 20, 2014. (Tr. at 60, ll. 13-15; at 64, ll. 6-25; Joint Ex. No. 5.)

Upon receipt of General Counsel's Exhibit 5, Fabiyi contacted his boss, Wayne Cassard. (Tr. at 65, ll. 10-13.) After speaking with Cassard, Fabiyi met with Fulton and her supervisor, Murphy, on March 25, 2014. The meeting lasted approximately 45 minutes. (Tr. at 66, ll. 6-9.) The meeting was held in Murphy's office on the 5th floor of the facility. (Tr. at 66, l. 5.) In the meeting, Fabiyi notified Fulton that he was aware of the complaint, understood that she was uncomfortable going to the HR office to talk about it and that is why he had come to her unit to discuss the matter. (Tr. at 67, ll. 16-23.) Fabiyi testified that Fulton appeared to be very upset. Fabiyi testified that Fulton had received a telephone call from Van Leer and that Fulton became upset because Van Leer used vulgar and abusive language and Fulton felt threatened. (Tr. at 68, ll. 6-10.) Fulton indicated that she felt very threatened and uncomfortable with the call. (Tr. at 68, ll. 14-17.) Fulton relayed to Fabiyi the profanity used by Van Leer and in addition, Van Leer's statement "you guys are going to lose this for us." (Tr. at 69, ll. 5-14.) Fabiyi notified Fulton that policies were in place where such language could not be used. Fabiyi reviewed Schmid's statement. (Tr. at 71, ll. 1-4; GC Ex. 2.)

On March 25, 2014, Fabiyi, Fulton, and Murphy met in Murphy's office. (Tr. at 66, ll. 4-5; at 67, ll. 18-24.) At this point, Fabiyi had Schmid's statement. Fabiyi's notes from the March 25, 2014, meeting were entered into evidence as General Counsel's Exhibit 4. Fabiyi contemporaneously made the notes which provide verbatim:

"She asked, Are you at work? I said, yes. Girl, what the fuck is going on there? What do you mean no to the vote? Tell them motherfuckers you need to get it right. You all need to get it right. Relayed to coworkers and they informed Colleen. She didn't say she was going to beat my ass. I felt threatened, yes. We go out bowling, did say 'harm.' Got a text that Theresa just called me at another floor. She didn't say she will beat my ass. Very unprofessional. I felt threatened. I talked." Okay. "You know I'm not like that. Ain't there motherfuckin'

business anyway. She told me my charge nurse came to me said it was you who went to HR. My coworkers say she shouldn't have done that. The next morning after the call, that is what I - - what are ya'll motherfuckers doing up there? She was sitting waiting outside. I was trying to," and I missed a word there, "these motherfuckers need to get their acts straight. She said, 'I thought you and I are cool.'" (Tr. at 141 l. 17-25, at 142 ll. 3-10).

Fabiyi's contemporaneously made notes constitute a business record and therefore are admissible.

Fabiyi also testified Fulton relayed to Fabiyi that Van Leer was waiting for her the next time she was being dropped off for work. (Tr. at 142 ll. 20-21.) This is a critical distinction in Van Leer's testimony. Van Leer tries to create the impression that the two were in the parking lot together and walking to work together. However, the credible evidence is that Fulton was being dropped off. Van Leer had to have been waiting on Fulton at the facility, not in the parking lot in order to intercept her on her way to work. (Tr. at 142, ll. 17 - 143, l. 2)

Fabiyi also made contemporaneous notes of the March 28, 2014, meeting with Van Leer and Dugan. The notes are entered as General Counsel's Exhibit 5. The notes provide verbatim:

"Okay. "Last Wednesday evening, met a - - met at work. They told me about something they heard about the Union. I called one of my coworkers, Lorriane; did not call Brooke (phonetic). Later called Terry. Yes, I was cursing, my friend. Not at work, on my private line. I was cursing. She said I'll call you back because I'm standing with Collen.' Got to work on Thursday, Ellie wasn't warned; Sam, the same thing. I asked a couple of people 'What is going on?' They said 'We heard that someone called threatening.' Dawn was twisting my words. Someone I had a problem with was saying curse words describing. I was not harassing anyone. I called Terry only. Why would I be calling them names? Not at work, cursing on their private line. I called a friend of mine and I'm cursing but not at work. People say they are going to make an example of you, like Naomi. I felt I was watched last week. Thursday and Friday, when I did nothing wrong. Terry and I have spoken several times. So what you were cursing. My words have been twisted. Rumors. They said 'Several people were called by me.' Several people said, 'Colleen was asking who is it that is using profanity on the phone?' 'I was not cursing at work. I didn't threaten her. We go bowling together. I'm cool with her, why would I threaten her? Words twisted by Dawn. I don't understand this. I know I didn't threaten anyone. Where is everyone getting this from? Friday evening towards the end, taking teleboxes down, discharging patients, et cetera, -- -- "E-T-C, took it out by one CNA, and

I talked and we were speaking. She says 'bye,' and I said 'bye.' I heard Loran say, 'I don't know why Theresa was off the floor. She just called. Why are you off the floor? Why are they watching you?' Sam called Ellie, and she called the floor. The end of my shift, I punched out and said, 'Can I please talk to you? I was off 'cause I took the teleboxes down.' I also said, 'The way I've been looked at is not right.' I felt and sensed harassment when people were cold as ice toward me. Ellie handed me a paper rudely and set the rest on the table. I don't think that's right. I felt they were looking at me as guilty as charged. No, I didn't call anyone else or call anyone a snitch. Dawn is just mad at me. I need clarification. Since the campaign going on, the men were et cetera, call her when the shift is about to change." (Tr. at 148, l. 19 – 150, l. 18).

Fabiyi testified in depth about HR policy 601 as the Employee Code of Conduct. (Tr. at 58 ll. 11-17, at 152, ll. 2-4.) Fabiyi testified that Van Leer was disciplined for the first rule in the policy which states disruptive behavior, including but not limited to verbal or physical abuse/threats, intimidating, swearing, or coercing behavior directed toward a patient, visitor, contracted personnel or facility employee, or any behavior which disrupts or interferes with patient care and other staff members' work performance, or creates a non-productive work environment. (Tr. at 152, ll.10-20; Joint Ex. 3.) On April 8, 2014, Van Leer, Fabiyi, and Dugan met in the HR office. (Tr. at 118, ll. 10-12.) Fabiyi estimated that the meeting lasted about half an hour. (Tr. at 119, l. 2.) The purpose of the meeting was to notify Van Leer that the investigation had been completed and there was a decision to give her corrective action. (Tr. at 119, ll. 5-9.) The disciplinary action contained the signatures of Fabiyi and Dugan. (Tr. at 119, ll. 15-24, GC Ex 7.) Van Leer refused to sign the disciplinary action. (GC Ex. 7.) Van Leer had not received any other disciplinary actions. (Tr. at 121, ll. 7-9.) Fabiyi consulted with Cassard about the language contained on GC Ex. 7 and about the level of discipline to issue. (Tr. at 121, ll. 4-18.) Fabiyi testified that he recommended the level three. (Tr. at 123, ll. 5-7.)

General Counsel Exhibit 7 is clear that Van Leer was disciplined for displaying behavior that included profane and abusive language that was directed toward a hospital employee while the employee was at work and on duty. General Counsel Exhibit 7 also specifically provides,

“While we respect your right to express your views related to union organizing, it is not appropriate and in violation of our policy to do so using profane and abusive language.”

2. Wayne Cassard

Wayne Cassard is the top Human Resources official for the five acute care hospitals in Las Vegas, Nevada (Tr. at 290, ll. 16-25.) Cassard was first made aware of the telephone incident regarding Charging Party upon receipt of Joint Exhibit 5, the memo prepared by Schmid. (Tr. at 292, ll. 8-22.) Cassard instructed Fabiyi to meet with Fulton and review the Schmid statement with her and have her validate the information in the statement. (Tr. at 293, ll. 1-13.) Cassard also received other information including Joint Exhibit 6, Murphy’s statement about the incident. (Tr. at 293, ll. 20-25.) Cassard explained that the handwriting on General Counsel’s Exhibit 2, which is an additional copy of Schmid’s statement, was his. (Tr. at 294, ll. 15-23.) Cassard wrote on the left-hand margin the words “didn’t happen,” as well as the word “pressured by Theresa – felt threatened.” (Tr. at 295, ll. 5-11.) Cassard made these marks on the document as Fabiyi was describing the meeting with Fulton. (Tr. at 295, ll. 15-25.)

After reviewing the relevant information, Cassard discussed with Fabiyi what actions to take. (Tr. at 297, l. 18 – 298, l. 16.) Cassard, having ultimate responsibility for deciding what discipline should be given, concluded that the Level 3 written warning was appropriate. (Tr. at 298, ll. 1-25.) Cassard reviewed the language of the Level 3 and approved it. (Tr. at 299, l. 23 – 300, l. 7.)

3. Charging Party Theresa Van Leer

Charging Party Theresa Van Leer testified that she was employed as a Certified Nursing Assistant (CNA) at Respondent’s facility. (Tr. at 201, ll. 1-2.) Charging Party’s employment began on December 31, 2012. (Tr. at 201, ll. 3-4.) The only disciplinary action Charging Party received was the Final Written Warning at issue in this case for conduct occurring on March 19,

2014. (Tr. at 201, l. 24 – 202, l. 2.) Charging Party testified that in the fall and winter of 2013 she heard about the Union from a coworker and began to attend Union meetings. (Tr. at 202, ll. 1-25.) Charging Party testified that she gave coworkers authorization cards. (Tr. at 203, l. 23 – 204, l. 5.) The Union election was held on Thursday, March 20, and Friday, March 21, 2014. (Tr. at 204, ll. 6-8.)

Charging Party testified about the telephone call she made to another CNA, Terry Fulton, on March 19, 2014. (Tr. at 212, ll. 3-8.) Charging Party testified that she was not working when she telephoned Fulton. (Tr. at 212, ll. 9-10.) Charging Party testified that she knew Fulton was a CNA who worked on Tower 5. (Tr. at 212, ll. 11-12.) Charging Party was off duty and Fulton was on duty. (Tr. at 212, ll. 9-13; at 250, l. 25 – 251, ll. 1-2.) Charging Party and Fulton knew each other and had both gone with a group to bowl on one occasion. (Tr. at 212, ll. 16-25.)

Charging Party testified that she had received a telephone call earlier from another employee on the same floor as Fulton regarding a rumor that employees on that floor were not going to vote for the Union. (Tr. at 213, ll. 16-20.) Therefore, Charging Party called Fulton. According to Van Leer, she said, “What the fuck is this I’m hearing that such and such said -- that I heard -- I told her that I had just heard a rumor that -- and, you know, yes, I was using profanity -- that I heard a rumor about the union. And I said, well, what the fuck is that I’m hearing that everybody is saying -- I got a call that everyone said, oh, everyone on Tower 5 should wait -- everyone on Tower 5 wants everyone to get together and wait a year to see what the hospital will do, and then unionize again. I said to her I’m so sick of hearing this bullshit. I’m so sick of this fucking shit. That’s what I was saying to her. So I was -- not word for word verbatim is what I’m saying, you know, but this was in the line of what I was saying to her. You know, I’m so sick of hearing this motherfucking shit. I just want it all to be over. I was -- so one person told me we couldn’t unionize for a couple of years. You said -- and I heard it was a year.

I just want it to be over. I'm so sick of this motherfucking shit. I was so frustrated. And these are the things I was saying to her out of frustration, your honor. I was cursing in my conversation. I wasn't cursing her out." (Tr. at 213, l. 21 – 214, l. 16.) Van Leer testified she and Fulton were not friends. (Tr. at 270, l. 14.)

Charging Party, lacking all credibility, repeatedly testified that she did not call Fulton because she was concerned about the union vote. (Tr. at 252, ll. 1-16.) Charging Party insisted that she wasn't concerned about whether the union was going to win or not. (Tr. at 252, ll. 1-16.) The ALJ's Opinion discredits this testimony by Van Leer. However, the ALJ's Opinion credits Van Leer's testimony on all other matters.

Charging Party admitted that she called Fulton on purpose and that she dialed Fulton's direct phone number to see if Fulton knew about the "rumor." (Tr. at 216, ll. 14-23; at 253, ll. 19-25.) Charging Party admitted that she was calling Fulton on her private cell phone number. (Tr. at 254, ll. 5-7.) Again, lacking all credibility, upon being questioned by the Administrative Law Judge, Charging Party denied that the purpose of the call was to find out what was going on on Tower 5 with the union. (Tr. at 254, l. 10 – 255, l. 16.) Charging Party even testified that she was not upset about the rumor that employees were talking about waiting a year to vote for the union. Charging Party admitted she called Fulton on Tower 5 because that's where the rumor was supposed to have started. (Tr. at 255, ll. 14-16.) Charging Party did admit that she was trying to find out what employees on Tower 5 were talking about. (Tr. at 255, ll. 19-21.) However, Charging Party denied that she tried to influence whether the rumor was true or to affect how employees voted. (Tr. at 255, l. 22 – 256, l. 1.) Charging Party went so far as to testify that she didn't try to convince anybody to vote for the union. (Tr. at 256, ll. 16-20.)

When Charging Party was asked whether she was aware that Fulton was not supposed to accept private telephone calls on her cell phone while on duty, Charging Party testified that she

was not aware of that. “That’s her. That’s not me.” (Tr. at 257, l. 24.) When Charging Party was asked whether she was supposed to take personal cell phone calls when on duty, she indicated, “If I’m working with a patient, no.” (Tr. at 258, l. 1.) Charging Party eventually reluctantly admitted that if she was not on break she was not supposed to be on her cell phone (Tr. at 258, ll. 2-7).

Charging Party admitted she did not see Fulton the night after the call and she had no idea how Fulton reacted to receiving the telephone call. (Tr. at 258, ll. 20-25.)

Charging Party testified that a memo was circulated the next morning explaining to employees that if they had received harassing phone calls about their union views that they could report it. (Tr. at 222, ll. 14-17.) After reading the memo and speaking with employees on her unit, Charging Party called Fulton at home around 10:00 a.m. (Tr. at 225, ll. 1-23.) Charging Party testified that she called Fulton to discuss whether the report of harassing phone calls had come from Tower 5. According to Charging Party, Fulton immediately indicated that she didn’t make any report about harassment or use of profanity. Charging Party indicated to Fulton that she said, “Oh, okay, dear, because I’m hearing different things, that somebody was harassed.” (Tr. at 225, ll. 17-18.) Charging Party continued, “The memo said they were harassed about their views, and you know that wasn’t the case.” (Tr. at 225, ll. 18-19.) Again, Charging Party’s testimony is not credible, and the purpose of the call was to let Fulton know Van Leer was not happy.

Charging Party insisted that she did not wait outside for Ms. Fulton to arrive the first day they were both at work, Friday, March 21, 2014. (Tr. at 260, ll. 12-21.) Charging Party admitted that she saw Fulton on Friday morning as she entered work. (Tr. at 261, ll. 2-8.) Charging Party testified that she saw her while walking into work. Charging Party admitted that she asked Fulton about the phone call and that Fulton allegedly said, “Girl, that wasn’t me who said

nothing about that phone call. . . .” (Tr. at 262, ll. 3-6.) Upon examination by the Administrative Law Judge, Charging Party testified that she told Fulton that she received several phone calls from other people up there (meaning Tower 5). (Tr. at 262, ll. 19-25.)

What is abundantly clear is that Charging Party made a point of questioning Fulton about every aspect of the telephone call and what had transpired thereafter. (Tr. at 262, l. 20 - 264, l. 6.) Charging Party made a point of talking to Fulton several times between that Thursday and March 25, 2014. (Tr. at 264, ll. 7-12.) Fabiyi met with Fulton on March 25, 2014, to review Schmid’s memo. (Tr. at 66, ll. 1-6.) By this time Van Leer had conveyed a clear message to Fulton to not get Van Leer in trouble.

Charging Party testified that there was a meeting with Carol Dugan and Human Resources Manager Yomi Fabiyi on March 28, 2014. (Tr. at 233, ll. 9-17.) According to Charging Party, Fabiyi indicated that he needed Charging Party’s badge because she was being suspended during an investigation for calling employees and telling them that she was going to kick their ass if they didn’t see her views about the union (Tr. at 234, ll. 2-10).

Charging Party testified that she was asked by Fabiyi what the conversation with Fulton was about. (Tr. at 236, ll. 17-20.) Charging Party told Fabiyi that it was private and none of his business but admitted that it was about the union. (Tr. at 236, ll. 19-24.) Charging Party also testified that Fabiyi told her not to discuss anything that had transpired in the meeting and not to call anybody. (Tr. at 237, ll. 2-9.) As Dugan and Charging Party returned to the unit, Dugan attempted to console Charging Party, who testified she was very upset. (Tr. at 238, ll. 17-25.) Charging Party testified that on April 7, Fabiyi contacted her and arranged a meeting on April 8 at 6:30 in the evening. (Tr. at 240, ll. 2-14.) Fabiyi presented Charging Party with the Level 3 disciplinary action in the meeting. (Tr. at 240, ll. 17-25.) Charging Party admitted Fabiyi read the contents of General Counsel’s Exhibit 7 to her, including the entirety of the incident

language. (Tr. at 276, ll. 13-19.) According to Charging Party, she recounted the entire conversation with Fulton and argued with Fabiyi about the Level 3 disciplinary action. (Tr. at 240, l. 17 – 242, l. 23.) According to Charging Party, Fabiyi instructed her not to discuss the Level 3. (Tr. at 243, ll. 10-13.) Charging Party refused to sign the write-up. (Tr. at 240, ll. 6-11.)

D. Van Leer Level 3 Final Written Warning (Exceptions 12, 13, 14, 19, 20, 21, 22, 23, 24, and 25)

The ALJ's Opinion finds that on March 28, 2014 through April 8, 2014, Van Leer was suspended and issued a Final Written Warning because Van Leer assisted the union and engaged in concerted activities and to discourage employees from engaging in these activities.

Van Leer was not engaged in protected conduct and was not disciplined for protected conduct. In some instances, employees may be given leeway for "impulsive behavior when engaging in concerted activity" Piper Realty Co., 313 NLRB 1289-90, (1994). However, Charging Party's behavior was not impulsive. In fact, it was clearly premeditated and intended to coerce co-employees. Therefore, the Atlantic Steel Co., 245 NLRB 814 (1979), analysis does not apply. In Atlantic Steel, the Board created a four-factor test when an employee engaging in concerted activity engages in impulsive behavior. The four-factor test essentially balances whether the employee's conduct becomes unprotected. Herein, Charging Party's behavior was neither impulsive nor protected, concerted activity.

For purposes of argument only, Desert Springs will provide an analysis of the facts in accordance with the Atlantic Steel factors. Under Atlantic Steel, the Board carefully balances four factors in determining whether the protection of the Act has been lost in a given situation: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the

employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Atlantic Steel Co. at 816.

The first of the factors, the place of the discussion, weighs heavily in favor of a finding that Charging Party lost the protection of the Act. While Charging Party was not on duty, Ms. Fulton was on duty and in her normal work area. Charging Party's loud outburst, while on the telephone, obviously interfered with the workplace and upset Ms. Fulton to the point where she had difficulty calming down and explaining the content of the telephone conversation.

The second factor in the analysis, the subject matter of the discussion, arguably favors a finding that Charging Party did not lose the protection of the Act. Charging Party's profane threats and comments were aimed at Fulton and the fifth floor because a rumor about how the floor would vote against representation, applied to how employees would cast their vote. While Respondent does not concede that this factor weighs in favor of Charging Party's not losing the protection of the Act, Desert Springs believes Charging Party's premeditated telephone call related to how Fulton and others would vote. Charging Party insisted on cross examination and in questioning by the Judge that the purpose of the call was not to find out about the Union, that she did not try to influence how people voted, and that she wasn't upset about the rumor. Therefore, this factor is neutral.

The third factor, the nature of the outburst, weighs heavily in favor of a finding that Charging Party lost the protection of the Act. Charging Party's conduct was not impulsive at all. Charging Party's "outbursts" were premeditated, profane, threatening, and abusive.

The fourth factor, the presence of an unlawful provocation for the outburst, similarly weighs heavily in favor of a finding that Charging Party lost the protection of the Act. Again, Charging Party's conduct was not impulsive at all. Charging Party's profane "outbursts" were not a reaction to any unfair labor practice allegedly committed by Desert Springs. There were no

election objections filed. Van Leer admits the reason for the call was the rumor about how employees intended to vote, not that Desert Springs had committed unfair labor practices.

Therefore, even applying the Atlantic Steel analysis, the four factors weigh heavily in favor of a finding that Charging Party lost the protection of the Act. The Board has ruled similarly in numerous cases. *See, Verizon Wireless*, 349 NLRB 640 (2007); *Felix Indus., Inc.*, 339 NLRB 195 (2003); and *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005).

Van Leer's conduct on March 19, 2014, was not protected by the Act. Further, there is no evidence Van Leer engaged in notable union activity which would be reason for retaliation against Van Leer. Desert Springs expressly recognizes Van Leer and other employees' right to engage in union activity and in fact stated so in the Level 3 final written warning which is GC Ex. 7.

Van Leer's telephone call was clearly in violation of Policy 601, Rule 1. Van Leer's conduct clearly displayed disruptive behavior including profane and abusive language directed toward a hospital employee while the employee was at work and on duty. Van Leer's explanation that she and Fulton just talk like that is clearly false. Van Leer and Fulton are not that close and are not friends. Van Leer deserved, at a minimum, a Level 3 final written warning.

Van Leer's testimony and conduct demonstrate that Van Leer made a profane and abusive telephone call. Thereafter, the very next morning, she tried to cover her tracks and intimidate Fulton into not participating in any investigation. Van Leer thoroughly interrogated Fulton at 10:00 a.m. the next morning by telephone, and thereafter at every opportunity as Van Leer and Fulton entered work. Van Leer's purpose in attempting to cover her tracks was to avoid what she knew she deserved – disciplinary action. In her efforts to avoid disciplinary

action she continued to intimidate Fulton, raise any number of unrelated issues, and eventually make false allegations regarding various supervisors.

The ALJ's Opinion grants back pay for the time on suspension. However, if Van Leer had received any level of discipline she would not have been eligible to receive compensation from the time she was suspended pending investigation. The ALJ's Opinion does not address this issue at all. The overwhelming credible evidence indicates a contrary result. The fact is, Van Leer very easily could have had her employment terminated for this outrageous conduct. However, as Cassard testified, based on her otherwise clean work history, the decision was made that a Level 3 final written warning was an appropriate level of discipline. The fact Van Leer was not disciplined before or after this incident weighs heavily in favor of Desert Springs. Desert Springs is not after Van Leer for union activity. Van Leer engaged in a precipitating event, an abusive telephone call, and was disciplined for that conduct. No other discipline has been issued because, apparently, Van Leer has not engaged in any inappropriate conduct. The allegations in Paragraph 6 of the Complaint should be dismissed.

E. Fabiyi (Exceptions 16 and 17)

The ALJ's opinion found that on two occasions Fabiyi issued an overly-broad directive that Van Leer not discuss the investigation and discipline. There is no rational explanation for why Fabiyi would issue such an instruction or threat.

Fabiyi's testimony is clear that he did not issue any prohibition on Van Leer's discussing her discipline. Van Leer's testimony regarding this matter is not credible.

F. Kaufmann and McNutt (Exceptions 5 and 15)

The Board's current position with regard to the solicitation of employee grievances during an organizational campaign "raises an inference that the employer is promising to remedy the grievances." In Albertson's LLC, 359 NLRB No. 147 (2013), the Board reaffirmed that the

legality of the employer's conduct does not turn on an employee's subjective reaction, but rather, on whether, under all the circumstances the employer's conduct had a reasonable tendency to interfere with, restrain or coerce the employee in the exercise of rights guaranteed under the Act.

The ALJ's Opinion found that on March 8, 2014, Kaufmann solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if they rejected the union as their collective bargaining representative. There is no evidence that Kaufmann made any promises regarding increased benefits and improved terms and conditions of employment. Van Leer testified Kaufmann solicited employee complaints. Van Leer's testimony is not credible. Kaufmann testified that he had received significant training regarding what could and could not be said regarding the union. No consideration of this training was considered by the ALJ. Further, Kaufmann spent hours, days, and weeks talking with employees about the union election. Van Leer admits the discussion with Kaufmann started with his saying he could provide 100 reasons to not support the union. Van Leer is either not correctly recalling any conversations she had with Kaufmann or she is misstating the content of the discussion. The results of the election were certified on March 31, 2014, the first business day after expiration of the objections period. (Joint Ex. 2.) No other allegations of any violations by Kaufmann have ever been alleged and Van Leer is the only person to testify as to any violations. Since there is no credible proof of solicitation of grievances, no violation of Section 8(a)(1) occurred.

The ALJ's Opinion also found that on or about March 15, 2014, Respondent, by Ellie McNutt in a first floor hallway at Respondent's facility, violated the Act by soliciting employee complaints and grievances and promised its employees increased benefits and improved terms and conditions of employment if they rejected the union as their collective bargaining representative. Like Kaufmann, McNutt had received significant training about what she could

and could not say during the campaign. Also, like Kaufmann, this is the only allegation during the entirety of the campaign of wrongdoing by McNutt. There is no credible testimony that McNutt solicited employee complaints and grievances during the union campaign. Further, there is no evidence in the record whatsoever that McNutt made promises of improvements if the union was rejected.

G. Absent witnesses, Terry Fulton and Carol Dugan (Exceptions 1 and 2)

The ALJ's Opinion found that Respondent's failure to call Terry Fulton and Carol Dugan was subject to an adverse inference. (JD at 5, ll. 21-24; at 11, ll. 32-34; at 6, ll. 5-24.) The ALJ Opinion's finding is an error.

General Counsel admitted that it attempted to subpoena Fulton. However, General Counsel did not seek to enforce the subpoenas and have Fulton appear. The absence of Fulton creates a presumption that Fulton's testimony would have been harmful to General Counsel's position. Fulton was a necessary and critical witness to General Counsel's case, hence the efforts to subpoena her to appear. Fulton provided information to Respondent's supervisors immediately following the telephone call with Van Leer, was thereafter contacted the next morning by Van Leer, and then in person the next day and several other days prior to the time that Fulton met with Fabiyi to discuss the events which transpired in the telephone call. Fulton obviously avoided any efforts General Counsel made to have her appear. Consequently, a negative inference should be drawn against General Counsel's case.

Supervisor Carol Dugan had an 8(a)(1) allegation alleged against her by Van Leer. The ALJ's Opinion found in favor of Respondent on that allegation. The ALJ's Opinion found, in error, that Dugan should have been called to shore up Fabiyi's testimony. However, that is not the case. Fabiyi's testimony and contemporaneously made notes entered as exhibits demonstrate the best evidence of what actually transpired. Van Leer's testimony regarding these meetings is

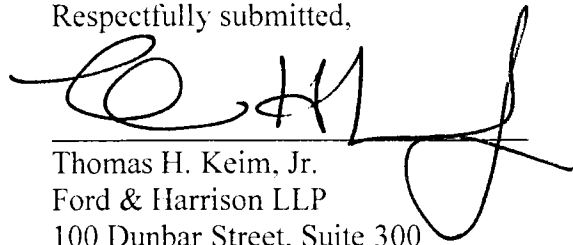
simply not credible, and upon full consideration of the testimony and exhibits submitted, Fabiyi should be credited and no adverse inference placed upon Respondent by the absence of Dugan.

IV. CONCLUSION

WHEREFORE, based on the above, Respondent respectfully requests its Exceptions be accepted in full.

Dated this the 9th day of April, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. H. Keim, Jr.', written over a horizontal line.

Thomas H. Keim, Jr.
Ford & Harrison LLP
100 Dunbar Street, Suite 300
Spartanburg, South Carolina 29306
Telephone: 864-699-1100
Facsimile: 864-699-1101
tkeim@fordharrison.com

CERTIFICATE OF SERVICE

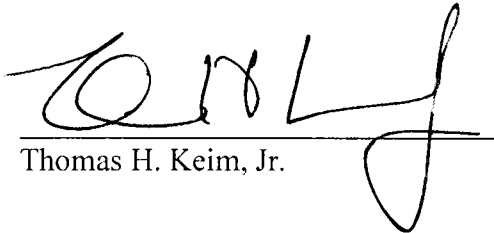
I HEREBY CERTIFY that an original of the foregoing was filed electronically with the National Labor Relations Board at *www.nlr.gov* on this 9th day of April, 2015, and a copy of the foregoing has been forwarded by U.S. Mail to:

Theresa Van Leer
1350 North Town Center Drive, #2070
Las Vegas, Nevada 89144

and a copy of the foregoing has been forwarded by e-mail to:

Fernando Anzaldua
Field Attorney
National Labor Relations Board, Region 28
fernando.anzaldua@nlrb.gov

This the 9th day of April, 2015.


Thomas H. Keim, Jr.